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In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD ISAAC MENASCHE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The Solicitor General, on behalf of the United States, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, affirming a judgment admitting respondent to citizenship.

OPINIONS BELOW

The opinions of the Court of Appeals (R. 69–73) are reported at 210 F. 2d 809. The opinion of the District Court (R. 56–62) is reported at 115 F. Supp. 434.

JURISDICTION

The judgment of the Court of Appeals was entered March 3, 1954 (R. 73). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Section 405 (a) of the Immigration and Nationality Act of 1952 provides that a "right in process of acquisition" on the Act's effective date shall be governed by prior law unless otherwise provided. Section 405 (b) provides that petitions for naturalization filed *before* the effective date of the Act shall be determined in accordance with prior law. The question presented is whether a petition for naturalization, filed *after* the effective date of the Act by one who was not eligible for naturalization when the Act went into effect, may nevertheless be determined under prior law because a declaration of intention had been filed before such effective date.

STATUTES INVOLVED

Section 405 of the Immigration and Nationality Act of 1952, 66 Stat. 280, provides in pertinent part:

> SEC. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or

proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

Section 316 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 242, provides in pertinent part:

> No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, * * *.

Section 307 of the Nationality Act of 1940, 54 Stat. 1142, 8 U. S. C. (1946 ed.) 707, provided in pertinent part:

> (a) No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years * * *.
>
> (b) Absence from the United States for a continuous period of more than six months but less than one year during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of filing the petition for naturalization, or during the

> period between the date of filing the petition and the date of final hearing, shall be presumed to break the continuity of such residence, but such presumption may be overcome by the presentation of evidence satisfactory to the naturalization court that such individual had a reasonable cause for not sooner returning to the United States. * * *.

STATEMENT

Respondent was admitted to the United States for permanent residence on March 7, 1948 (R. 38). On April 16, 1948, he filed a declaration of intention (R. 53–55). His petition for naturalization was filed on April 24, 1953, in the District Court of Puerto Rico (R. 32–41).

During the period between his entry and the filing of the petition for naturalization, respondent, in his capacity as an employee of an American motion picture company, had been absent from the United States during the following periods (R. 39):

> April 22, 1948—March 5, 1949.
> March 27, 1949—March 7, 1950.
> March 19, 1950—March 5, 1951.
> March 19, 1951—February 24, 1952.
> June 17, 1952—June 21, 1952.
> January 5, 1953—January 7, 1953.

Thus, during the five-year period immediately preceding the date of his petition for naturalization, he had been absent from the United States a total of forty-four months and he had been

physically present in the United States a total of sixteen months (R. 47).

The petition for naturalization was opposed on the ground that respondent had failed to meet the requirement of Section 316 (a) of the Immigration and Nationality Act of 1952, *supra*,[1] that he be physically present within the United States for at least one-half of the five-year period preceding the filing of petition (R. 24–31). At the hearing, the Government conceded that, if petitioner's case were governed by Section 307 (a) of the Nationality Act of 1940, *supra*, he would have been eligible for naturalization since he had not abandoned his residence in the United States during the five-year period (R. 15). The District Court granted the petition for naturalization (R. 65), holding that, under the general savings clause of the 1952 Act, Section 405 (a), *supra*, petitioner's application was to be determined under the 1940 Act (R. 56–65). The Court of Appeals affirmed (R. 73). In its opinion, the court recognized that the specific provision in Section 405 (b), *supra*, that petitions for naturalization filed before the effective date of the 1952 Act should be determined in accordance with the law in effect at the time of filing, suggested that all petitions filed after the effective date of the Act

[1] The effective date of the Act was December 24, 1952, before the filing of the petition for naturalization and, in fact, before petitioner had completed the five-year residence period required under both the old and the new Acts.

should be determined under the 1952 Act (R. 71). It nevertheless held that, after the filing of his declaration of intention in 1948, petitioner had a "right in process of acquisition" which was saved by the broad provisions of Section 405 (a) (R. 69–73).

REASONS FOR GRANTING THE WRIT

In holding that, despite the provisions of Section 405 (b) specifically relating to petitions for naturalization, such petitions filed after the effective date of the 1952 Act may nevertheless be determined under prior law by virtue of the broad language of Section 405 (a), the court below has decided a question of continuing importance in the administration of the naturalization laws in a manner which is basically in conflict with the decision of the Court of Appeals for the Second Circuit in *Shomberg* v. *United States*, 210 F. 2d 82, petition for certiorari pending, No. 717, this Term.

1. Section 405 (a) contains broad language saving, *inter alia*, "any status, condition, right in process of acquisition," at the time the Act became effective, with, however, the qualifying clause "unless otherwise specifically provided therein." Section 405 (b) specifically provides:

> Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect

> shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

Even if it be assumed, as the court below held, that petitioner, who had not completed his five-year residence requirement and therefore had no right to file a petition for naturalization when the new Act took effect, was nevertheless possessed of a "right in process of acquisition,"* it is clear that, if Sections 405 (a) and 405 (b) are both to be given effect, Section 405 (b) must be deemed a clause "otherwise specifically provided" in the statute, which takes naturalization proceedings out of the general provisions of Section 405 (a). Its express provision that petitions for naturalization heretofore filed shall be governed by the prior law shows that petitions for naturalization subsequently filed are to be governed by the new Act. This conclusion is supported, not only by the well-established and often reiterated rules of statutory construction that "It is the duty of the court to give effect, if possible,

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*We believe this assumption is itself wrong. There is no "right" to naturalization until all the requirements fixed by Congress have been met. *Tutun* v. *United States*, 270 U. S. 568, 578. Since petitioner had not met those requirements by the time the new Act went into effect and could not have been naturalized prior to that date, there was no right which could have been in the process of being acquired.

See also *Brown* v. *Duchesne*, 19 How. 183, 194; *McKenna* v. *Scottish Investment Company*, 153 U. S. 318, 323; *Hellmich* v. *Hellman*, 276 U. S. 233, 237; *McDonald* v. *Thompson*, 305 U. S. 263, 266; *Shapiro* v. *United States*, 328 U. S. 38[illegible], 344.

to every clause and word of a statute" (*Montclair* v. *Ramsdell*, 107 U. S. 147, 152),[1] and that the general language of a statute "will not be held to apply to a matter specifically dealt with in another part of the same enactment" (*Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208), but also by the specific language of other sections of the Nationality Act of 1952.

Section 405 (b), dealing with petitions for naturalization, itself contains the qualification "except as otherwise specifically provided in title III," thus showing a Congressional purpose that even petitions for naturalization filed before the effective date of the Act should in some measure be governed by the new statute. When Congress spelled out those specific exceptions in Title III (Sections 311, 313, 315, 318 and 331 (d) of the 1952 Act), it introduced each with the clause "Notwithstanding the provisions of section 405 (b)," or equivalent phraseology. It did not say "notwithstanding the provisions of sections 405 (a) and (b)." Manifestly, when Congress thus rendered some provisions of the old law inapplicable under the specific savings clause of Section 405 (b) even where a petition for naturalization had actually been filed before the effective date

[1] See also *Townsend* v. *Little*, 109 U. S. 504, 512; *Kungys* v. *United States*, 485 U. S. 759, 778; *Missouri* v. *Ross*, 299 U. S. 72, 76; *National Labor Relations Board* v. *Jones & Laughlin*, 301 U. S. 1, 30; *Peckham* v. *United States*, 210 U. S. 103, 107.

of the new law, it could not have intended that the old law would nevertheless remain applicable under the general savings clause of Section 405 (a). This is clear evidence that Section 405 (b) was intended to be the savings clause exclusively applicable in determining whether the old or new law governs.

Section 405 is obviously derived, with modifications, from the savings clause provisions of Section 347 of the Nationality Act of 1940 (8 U. S. C. 747). This prior savings clause section consisted of a general savings clause, Section 347 (a), followed by the following subsection (b):

> Any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined within two years thereafter in accordance with the requirements of law in effect when such petition was filed.

The present Section 405 (b) is a substantially identical savings clause without the two-year limitation. The presence of the two-year limitation in the earlier specific savings clause for petitions for naturalization would even more clearly negate the possibility of prior law continuing to apply indefinitely to naturalization matters. Yet it appears that the two-year limitation was omitted in Section 405 (b) of the present Act only because it had resulted in con-

fusion. Compare *Petition of Hirsch*, 50 F. Supp. 638 (E. D. Pa.), with *Petition of La Bella*, 52 F. Supp. 980 (D. Conn.).

Moreover, the phrase "right in process of acquisition" in Section 405 (a), which was relied upon by the court below, seems to have originated in *Bertoldi* v. *McGrath*, 178 F. 2d 977 (C. A. D. C.), interpreting Section 347 of the 1940 Act in a situation not covered by a specific savings clause such as paragraph (b) of that section or Section 405 (b) of the present Act.

2. The Court of Appeals for the Second Circuit in *Shomberg* v. *United States*, *supra*, a case involving the construction of one of the exception clauses in Title III, Section 318, has rejected the rationale of the court below. In that case, it was contended that despite the phrase, "Notwithstanding the provisions of section 405 (b)," which appears in Section 318, that section of the 1952 Act could not be applied to a person whose petition for naturalization was pending when the new Act became effective because he had a "right in process of acquisition" which, under Section 405 (a) must be determined under the prior law. The court rejected that contention, holding that to read Section 405 (a) so broadly would render Section 405 (b) "entirely redundant." That is, in holding that a negating reference to Section 405 (b) subjects even pending petitions to the new Act, it was concluding

that the specific savings clause in that subsection is exclusively applicable to naturalization matters notwithstanding the broad language of Section 405 (a), which it admitted would apply in the absence of subsection (b), 210 F. 2d at 84–85. Thus, the *Slomberg* decision is in its reasoning in clear conflict with the decision below.

3. There was good reason for Congress to take naturalization proceedings out of the possible broad sweep of Section 405 (a) and to provide a savings clause specifically relating to naturalization. Congress must have been aware that there were many outstanding declarations of intention which were valid in the sense that they were less than seven years old (see 8 U. S. C. (1946 ed.) 731). While accurate figures are not available, the Immigration and Naturalization Service estimates that presently there must be on file about 300,000 of such declarations. Since the broad language of Section 405 (a), standing alone, could be subject to the interpretation now given it by the court below to make the old law applicable to any such declarants, it was natural that in a law which, as we show below, made a number of substantial changes in the requirements for naturalization, Congress would wish to prescribe a specific rule for determining whether the new or the old law governed. Congress did this by enacting Section 405 (b), which fixes the date of the filing of the petition as the dividing

line.[5] The decision below is thus clearly contrary to the obvious Congressional intent as reflected in the language and context of the Act.

4. The number of outstanding declarations of intention makes it evident that the question presented by this case is one of general importance. The problem is not even limited by the number of those filing declarations of intention. *In re Jocson*, 117 F. Supp. 528 (D. Hawaii), presently on appeal before the Ninth Circuit, held that an "Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization," filed by an alien serving in our armed forces who was not required to file a declaration of intention, was sufficient to mark the start of "a right in process of acquisition" which was preserved by Section 405 (a) and which thus made the 1940 Act, rather than the 1952 Act, controlling.

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[5] The decision below does not and could not rest on the fact that declarations of intention are mentioned in Section 405 (a) since declarations of intention are not required under Section 334 of the new Act. The legislative history shows that, when the proposal to eliminate the requirement of a declaration of intention was considered, it was pointed out that complete abolition of the declaration would jeopardize the status of a number of aliens under many state statutes and private regulations, such as union rules, which restrict the right to engage in certain types of work to citizens or declarant aliens. E. g. Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82d Cong. on S. 716, H. R. 2379 and H. R. 2816, pp. 79-80, 89. See also, the Immigration and Naturalization Systems of the United States, Sen. Rep. 1515, 81st Cong., 2d Sess., p. 738. Hence, Congress provided in Section 334 for the voluntary filing of a declaration and in Section 405 (a) preserved the validity of existing declarations.

While, of course, not all declarants or applicants will actually seek naturalization and while a number will undoubtedly be eligible under both the old and the new laws so that the question will not be material in such cases, there are a sufficient number of changes in the requirements for naturalization under the Immigration and Nationality Act of 1952 to insure that the question will recur in a substantial number of cases. The physical presence requirement of Section 316 (a) involved in this case is only one of many points of difference between the old and new Act. The *Jocson* case, for example, involved the command of Section 328 that persons seeking naturalization thereunder meet the requirement of Section 318 of admission for permanent residence. *United States* v. *Pringle* (C. A. 4), decided May 3, 1954, involved the residence requirements with respect to an alien spouse of an American citizen, Section 319 of the new act having made uniform provision therefor as against the varying provisions of Sections 310–312 of the 1940 Act, 8 U. S. C. (1946 ed.) 710–712.[8] Section 101 (f) of the 1952

[8] In the *Pringle* case the applicant had completed the requirements for citizenship under the old Act and had filed an "Application to file Petition for Naturalization" (Form N-400) before the new Act went into effect. The District Court in its opinion, on which the Court of Appeals relied, considered the application as "an essential of the naturalization proceeding," "not [a] remote, preparatory gesture toward citizenship." That case presents a somewhat different problem from the instant one for, as noted, respondent here was not even eligible for naturalization when the new Act went into effect.

Act specifies certain types of conduct which are to preclude a finding of good moral character, instead of leaving the matter to the discretion of the courts as under Section 307 of the 1940 Act, 8 U. S. C. (1946 ed.) 707.

Moreover, the *Shomberg* case illustrates that the proper construction of Section 405 will determine not only whether any step toward naturalization short of the filing of a petition will continue the applicability of the prior law, but also whether such provisions of the new Act as Section 318 will apply to cases in which petitions were pending when the new Act became effective.

Revision and codification of the immigration and naturalization laws had claimed the attention of a committee of Congress for approximately five years, during which time extensive public hearings were held throughout the country and the legislation was revised and redrafted.[1] It would be hard, even if a contrary intent had not been clearly indicated, to impute to Congress an intention to postpone the effectiveness of such legislation for as long as seven years as to any one who had previously filed a declaration of intention, and possibly for an even longer period as to those from whom no declaration was required but who had by some other act expressed an intention eventually to seek citizenship. In the face of the clear Congressional intent ex-

[1] See summary of legislative history set forth in the new edition of 8 U. S. C. A. pp. 1–93.

pressed in Section 405 (b) and the provisions enumerated above rendering even that savings provision inapplicable as to certain requirements of the new Act, the construction of Section 405 (a) by the court below frustrates a clear Congressional mandate.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

MAY 1954.